A

Tan Hun Chong v Public Prosecutor and another case

B

HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NOS 41S-14–11 OF 2016 AND 41H-57–11 OF 2016
AHMAD SHAHRIR JC
5 JANUARY 2018

C

Criminal Law — Appeal — Appeal against conviction and sentence — Accused charged under s 21 of the Control of Supplies Act 1961 ('the Act') and alternatively under s 20(1) of the Act — Magistrate found that prosecution proved prima facie case for offence under s 21 of the Act — Accused convicted for offence under s 21 of the Act — Whether element of control of diesel proven — Whether prima facie case established for both charges — Control of Supplies Act 1961 ss 20(1), 21 & 22

D

Evidence — Parol evidence rule — Evidence Act 1950, ss 91 & 92 — Whether evidence came within ambit of ss 91 and 92 of the Evidence Act 1950 — Whether parol evidence rule could be invoked

E

The accused was charged with an offence under s 21 of the Control of Supplies Act 1961 ('the Act') punishable under s 22(1) of the Act. Alternatively, he was charged under s 20(1) of the Act. At the close of defence, the magistrate found that the accused failed to raise a doubt in the prosecution's case for the charge under s 21 of the Act. The accused was convicted and sentenced with a fine of RM30,000 in default 12 months of imprisonment. Dissatisfied with the decision, the accused had filed an appeal against the conviction whereas the prosecution appealed against the sentence. The accused contended that the ten tonne lorry No PCD 4398 ('the said lorry'), in which the offending diesel was found belonged to Sin Eng Aun Mobile Crane Sdn Bhd ('the company') and the prosecution had therefore failed to prove the element of control against the accused of the diesel in question. However, based on an investigation conducted by the investigating officer ('PW7'), PW7 found that the company had two directors ie PW3 and PW6; and the said lorry had been sold to the accused for RM20,000 cash based on 'Surat Perjanjian Antara Penjual dan Pembeli' dated 1 May 2013 between the company and the accused ('exh P7'). The prosecution submitted that exh P7 which showed that the said lorry had been sold to the accused ought to be accepted and that the accused could not give evidence to the contrary based on the parol evidence rule.

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Held, allowing the appeal against conviction, setting aside the conviction and sentence, acquitting and discharging the accused of both the main and alternative charges:

(1) Based on the admission by both PW3 and PW6 that they did not

understand the contents of exh P7, the court attached very little weight to exh P7 as evidence to prove the sale of the said lorry to the accused. Further, it was not in dispute that the said lorry was still registered to the company. In light of the ownership record of the Road Transport Department in respect of the said lorry and the contents of exh P7, there was insufficient evidence adduced by the prosecution to show that the said lorry in fact belonged to the accused to prove the ingredient of control by the accused of the diesel in question (see paras 29 & 31).

(2) Parole evidence rule in respect of exh P7 was not a relevant consideration. Before parol evidence rule could be invoked by the prosecution to exclude the explanation by the accused to the ownership of the said lorry, it must be first established that exh P7 came within the ambit of ss 91 and 92 of the Evidence Act 1950. This had not been done by the prosecution and therefore, the parol evidence rule could not be invoked (see para 32).

(3) The court was satisfied that the prosecution had failed to prove prima facie case against the accused as the ingredients of the offence had not been proven. The accused should not had been called upon to enter his defence on the main charge (see para 39).

(4) Pursuant to s 173(f) of the Criminal Procedure Code, it was mandatory for the court to make a finding at the end of the prosecution's case whether a prima facie case had been made out against the accused. Based on the evidence, the learned magistrate did not call upon the accused to enter defence in respect of the alternative charge. Therefore, the prosecution had failed to establish a prima facie case against the accused in respect of the alternative charge (see paras 40–41).

[Bahasa Malaysia summary

Tertuduh dituduh dengan kesalahan di bawah s 21 Akta Kawalan Bekalan 1961 ('Akta') boleh dihukum di bawah s 22(1) Akta. Secara alternatif, dia dituduh di bawah s 20(1) Akta. Pada akhir pembelaan, majistret mendapati bahawa tertuduh gagal untuk membangkitkan keraguan dalam kes pihak pendakwaan untuk tuduhan di bawah s 21 Akta. Tertuduh disabit dan dijatuhkan hukuman denda sebanyak RM30,000 jika ingkar 12 bulan penjara. Tidak berpuas hati dengan keputusan, tertuduh telah memfailkan rayuan terhadap sabitan sementara pihak pendakwaan merayu terhadap hukuman. Tertuduh berhujah bahawa lori sepuluh tan No PCD 4398 ('lori tersebut'), di mana diesel yang salah telah didapati dimiliki oleh Sin Eng Aun Mobile Crane Sdn Bhd ('syarikat') dan pihak pendakwaan oleh itu gagal untuk membuktikan unsur kawalan terhadap tertuduh mengenai diesel yang dipersoalkan. Walau bagaimanapun, berdasarkan siasatan yang dijalankan oleh pegawai siasatan ('PW7'), PW7 mendapati bahawa syarikat mempunyai dua pengarah iaitu PW3 dan PW6; dan lori tersebut telah dijual kepada tertuduh untuk tunai sejumlah RM20,000 berdasarkan 'Surat Perjanjian Antara Penjual dan

Pembeli' bertarikh 1 Mei 2013 di antara syarikat dan tertuduh ('eksh P7'). Pihak pendakwaan berhujah bahawa eksh P7 yang mana menunjukkan bahawa lori tersebut telah dijual kepada tertuduh patut diterima dan bahawa tertuduh tidak boleh memberi keterangan bertentangan berdasarkan peraturan keterangan parol.

Diputuskan, membenarkan rayuan terhadap sabitan, mengenepikan sabitan dan hukuman, membebaskan dan melepaskan tertuduh terhadap kedua-dua tuduhan utama dan alternatif:

(1) Berdasarkan pengakuan oleh kedua-dua PW3 dan PW6 bahawa mereka tidak memahami isi kandungan eksh P7, mahkamah memberikan pertimbangan yang sedikit kepada eksh P7 sebagai keterangan untuk membuktikan jualan lori tersebut kepada tertuduh. Selanjutnya, ia tidak dipertikaikan bahawa lori tersebut masih berdaftar kepada syarikat. Berdasarkan rekod pemilikan Jabatan Pengangkutan Jalan berkaitan lori tersebut dan isi kandungan eksh P7, terdapat ketidakcukupan keterangan yang dikemukakan oleh pihak pendakwaan untuk menunjukkan bahawa lori tersebut sebenarnya dimiliki oleh tertuduh untuk membuktikan unsur kawalan oleh tertuduh mengenai diesel yang dipersoalkan (lihat perenggan 29 & 31).

(2) Peraturan keterangan parol berkaitan eksh P7 bukan pertimbangan relevan. Sebelum peraturan keterangan parol boleh dibangkitkan oleh pihak pendakwaan untuk mengecualikan penjelasan oleh tertuduh kepada pemilikan lori tersebut, ia mesti pertama kali membuktikan bahawa eksh P7 adalah terangkum dalam skop ss 91 dan 92 Akta Keterangan 1950. Ini tidak dilakukan oleh pihak pendakwaan dan oleh itu, peraturan keterangan parol tidak boleh dibangkitkan (lihat perenggan 32).

(3) Mahkamah berpuas hati bahawa pihak pendakwaan telah gagal untuk membuktikan kes prima facie terhadap tertuduh memandangkan unsur kesalahan tidak dibuktikan. Tertuduh tidak patut dipanggil untuk memasukkan pembelaannya atas tuduhan utama (lihat perenggan 39).

(4) Berikutan s 173(f) Kanun Tatacara Jenayah, ia adalah mandatori untuk mahkamah membuat dapatan pada akhir kes pihak pendakwaan sama ada kes prima facie telah dibuat terhadap tertuduh. Berdasarkan keterangan, majistret yang bijaksana tidak memanggil tertuduh untuk memasukkan pembelaan berkaitan tuduhan alternatif. Oleh itu, pihak pendakwaan telah gagal untuk membuktikan kes prima facie terhadap tertuduh berkaitan tuduhan alternatif (lihat perenggan 40–41).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 45–101.

For cases on Evidence Act 1950, ss 91 & 92, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2544–2547.

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237; [1956] 1 LNS 17 (refd)
Jagar Singh v PP [1936] 1 MLJ 92; [1936] 1 LNS 25 (refd)
Lamat bin Burut v PP [1993] 2 MLJ 273; [1992] 1 LNS 43, CA (refd)
Leong Poh Chin v Chin Thin Sin [1959] 1 MLJ 246; [1959] 1 LNS 50 (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28; [1955] 1 LNS 53 (refd)
Mohd Yusri bin Mangsor & Anor v PP and another appeal [2014] 4 MLJ 875; [2014] 7 CLJ 897, CA (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
Pathmanabhan a/l Nalliannen v PP and other appeals [2017] 3 MLJ 141; [2017] 4 CLJ 137, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Jamali bin Adnan [1985] 2 MLJ 392; [1985] 1 CLJ 196; [1985] CLJ Rep 656 (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324; [1980] 1 LNS 212 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] MLJU 504; [2006] 1 CLJ 457, FC (refd)
Ravindran a/l Ramasamy v PP [2015] 6 MLJ 509; [2015] 3 CLJ 421, FC (refd)
Theresa Toyat & Anor v KHL Sdn Bhd [2015] 5 MLJ 31; [2015] 7 CLJ 1051, CA (refd)
Toh Ah Loh and Mak Thim v Rex [1949] 1 MLJ 54; [1948] 1 LNS 72 (refd)

Legislation referred to

Control of Supplies Act 1961 ss 20(1), 21, 22(1), (2), 25
Criminal Procedure Code ss 173(f), 414
Evidence Act 1950 ss 91, 92

Mohd Ismail Mohamed (Ismail, Khoo & Assoc) for the appeallant.
Afiq Anwar Mohamed Sapian (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmad Shahrir JC:

INTRODUCTION

[1] At the magistrate's court, the accused was charged with two offences under the Control of Supplies Act 1961. One charge is for an offence under s 21 of the Control of Supplies Act 1961 punishable under s 22(1) of the same Act for being in possession of a controlled article, namely 2,231l of diesel in

lorry No PCD 4398, in such circumstances as to raise a reasonable suspicion that an offence against the Act is intended to be committed, that is in dealing with the diesel without a licence. The other is an alternative charge for an offence under s 20(1) of the Control of Supplies Act 1961 punishable under s 22(2) of the same Act for permitting a controlled article, namely, 2,231l of diesel which was stored in lorry No PCD 4398 at a premise which is not licensed or approved by the controller.

[2] At the close of the prosecution, the learned magistrate made a finding that the prosecution has succeeded in proving a prima facie case against the accused and called upon him to enter his defence on the charge under s 21 of the Control of Supplies Act 1961. At the close of defence, the learned magistrate found that the accused has failed to raise a doubt in the prosecution's case. The accused was convicted and sentenced with a fine of RM30,000 in default 12 months of imprisonment. The diesel seized was forfeited.

[3] The accused is not satisfied with the decision and appeals against the conviction. The prosecution is not satisfied with the sentence meted out by the learned magistrate and appeals against sentence. Both the appeal against conviction and sentence are heard together. After analysing the records of appeal and considering the submissions of learned counsel and the learned deputy public prosecutor, I allowed the appeal against conviction. In this judgment, the accused and the prosecution are referred to as they were at the trial court.

BRIEF FACTS

[4] At the magistrate's court, the two charges against the accused read as follows:

> Pertuduhan:
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> Bahawa kamu pada 12 November 2013, jam lebih kurang 12:30 petang, di kawasan lapang bersebelahan rumah No 2013, Kampung Pengkalan, Batu Kawan, di dalam Daerah Simpang Ampat, di dalam Negeri Pulau Pinang, telah ada dalam kawalan kamu barang kawalan yang juga merupakan barang berjadual iaitu minyak diesel sebanyak 2,231 liter di dalam lori nombor pendaftaran PCD 4398, dalam keadaan yang boleh menimbulkan syak yang munasabah untuk melakukan kesalahan di bawah Peraturan 3(1) Peraturan-Peraturan Kawalan Bekalan 1974, iaitu berurusan dengan diesel tersebut secara runcit atau borong tanpa lesen dan oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 21 Akta Kawalan Bekalan 1961 yang boleh dihukum di bawah seksyen 22(1) Akta yang sama.
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> Pertuduhan pilihan:
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> Bahawa kamu pada 12 November 2013, jam lebih kurang 12:30 petang, di kawasan lapang bersebelahan rumah No 2013, Kampung Pengkalan, Batu Kawan, di dalam Daerah Simpang Ampat, di dalam Negeri Pulau Pinang, didapati telah

membenarkan barang kawalan yang merupakan barang berjadual iaitu minyak diesel sebanyak 2,231 liter disimpan di premis yang tidak dilesenkan atau diluluskan oleh Pengawal iaitu di dalam tangki tambahan lori nombor pendaftaran PCD 4398. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 20(1) Akta Kawalan Bekalan 1961 yang boleh dihukum di bawah seksyen 22(2) Akta yang sama.

[5] On 12 November 2013 at about 12.30 noon, a raiding team from the Enforcement Division of the Ministry of Trade, Co-Operatives and Consumerism led by PW4 carried out a raid at an open area beside premise No 2013, Kampung Pengkalan, Batu Kawan, Simpang Ampat, Penang. There were other houses beside the open area. According to PW4, when the raiding team arrived at the scene, there were two vehicles parked close to each other at the open area, namely a tanker bearing registration No MAJ 7267 and a ten tonne lorry bearing registration No PCD 4398. Two other tankers were parked close to each other at another spot at the same place, namely one bearing registration No PDQ 1897 and the other bearing registration No DAE 4799.

[6] PW4 and his team made an observation but found that no one came near the vehicles. PW4 and his team then made a move towards tanker No MAJ 7267 and the ten tonne lorry No PCD 4398. Upon inspection, PW4 found that the tanker No MAJ 7267 was not locked and the ten tonne lorry No PCD 4398 was locked. PW4 found both vehicles to contain liquid suspected to be diesel in their respective tanks. The liquid suspected to be diesel in tanker No MAJ 7267 was found in four compartments of its tank while in the ten tonne lorry No PCD 4398, the liquid suspected to be diesel was found in an additional tank at its rear which was covered with canvas. PW4 also found diesel in the tankers No PDQ 1897 and No DAE 4799, respectively. PW4 was later instructed to inspect a Pajero bearing registration No PDN 1540 which was parked in front of house No 2013 at the same area. Upon inspection, PW4 found that under the rear seat, there is a modified tank. There was no evidence led as to whether there was any liquid suspected to be diesel too in this tank.

[7] All the vehicles were impounded and samples of the liquid suspected to be diesel were taken and sent for analysis. The chemist ('PW5') later confirmed that the liquid he analysed is diesel. According to PW4 in his report ('exh P63'), the quantity of diesel that was seized from the ten tonne lorry No PCD 4398 amounted to 2,231l based on exh P15 which was confirmed by the purchaser appointed by the Ministry of Trade, Co-operatives and Consumerism for the purchase of the seized diesel.

[8] The accused was not at the scene when the raid took place. According to the investigating officer ('PW7'), she carried out a search at the Road Transport Department to determine the ownership of the ten tonne lorry No PCD 4398.

The Road Transport Department search ('exh P69') shows that the ten tonne lorry No PCD 4398 belongs to Sin Eng Aun Mobile Crane Sdn Bhd.

[9] PW7 then made a further search at the Companies Commission of Malaysia in respect of Sin Eng Aun Mobile Crane Sdn Bhd and the official search results from the Companies Commission of Malaysia ('exh P6') shows that there are two directors for Sin Eng Aun Mobile Crane Sdn Bhd, namely Tan Seng Ee ('PW3') and Tan Heng Seng ('PW6'). Both of them are related to the accused. From her investigation, PW7 found that the ten tonne lorry No PCD 4398 has been sold to the accused for RM20,000 cash based on 'Surat Perjanjian Antara Penjual dan Pembeli' dated 1 May 2013 between Sin Eng Aun Mobile Crane Sdn Bhd and the accused ('exh P7').

[10] PW7 made an address search at Tenaga Nasional Bhd and found that premise No 2013 which was situated near the open area where the ten tonne lorry No PCD 4398 containing the offending diesel was found belongs to one Lee Paik Joo. PW7 then obtained a family tree for Lee Paik Joo from the National Registration Department and found that Lee Paik Joo is the accused's mother. PW7 also found out from the National Registration Department that the accused's address is at the same premise No 2013.

[11] The learned magistrate made a finding that the prosecution had proved a prima facie case against the accused for the charge under s 21 of the Control of Supplies Act 1961 and called upon the accused to enter his defence. The accused in his defence elected to give evidence under oath.

[12] In his defence, the accused said that the ten tonne lorry No PCD 4398, in which the offending diesel was found in the additional tank at its rear, belonged to Sin Eng Aun Mobile Crane Sdn Bhd.

The accused did not sign any document of transfer for the lorry. The accused only worked as a crane driver for the company. Although exh P7 carries his name as the purchaser of the lorry, the accused does not know what are the contents of exh P7. He was asked by PW3 and PW6 to sign exh P7 after being informed by them that it was a bond for the release of the lorry. The accused do not have the money to pay for the RM20,000 in cash allegedly as the purchase price for the lorry as stated in exh P7 as he was only a crane driver. The accused has no knowledge of the RM150 payment for permit rentals.

[13] The accused agrees that premise No 2013 is his mother's house but denies that he stayed at the house when the raid was carried out. According to the accused, he had moved out from the house in 1995 after he got married and stayed at Batu Kawan but did not have his address changed on his identity card.

At the material time, the accused maintained that he was at his house and that he did not drive the lorry.

DELIBERATIONS

The defence contentions

[14] Learned counsel for the defence argues that the prosecution had not proved the element of control against the accused of the diesel in question. The accused was not at the scene when the raid took place. The only evidence led by the prosecution to prove the ingredient of control against the accused to support the charge under s 21 of the Control of Supplies Act 1961 is based on exh P7 and assumption that the accused stayed at the house near the open area where the lorry was found, namely at premise No 2013. Learned counsel for the defence refers to the cases of *Leow Nghee Lim v Reg* [1956] 1 MLJ 28; [1955] 1 LNS 53, *Toh Ah Loh and Mak Thim v Rex* [1949] 1 MLJ 54; [1948] 1 LNS 72 and *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; [1956] 1 LNS 17.

[15] It was also argued that exh P7 is not a valid contract for the sale of the lorry to the accused because the registration card states that the lorry belonged to Sin Eng Aun Mobile Crane Sdn Bhd. In finding that the accused had control of the offending diesel, the learned magistrate had relied on the evidence of PW3 and PW6 and exh P7 which purportedly shows that the lorry was sold to the accused for RM20,000 cash. Both PW3 and PW6 are the directors of Sin Eng Aun Mobile Crane Sdn Bhd and obviously have an interest to protect in this case. Learned counsel for the accused refers to the cases of *Theresa Toyat & Anor v KHL Sdn Bhd* [2015] 5 MLJ 31; [2015] 7 CLJ 1051 and *Leong Poh Chin v Chin Thin Sin* [1959] 1 MLJ 246; [1959] 1 LNS 50.

[16] It was also argued that the charge against the accused was bad for duplicity. The accused was charged for two different offences based on the same set of facts. One charge under s 21 of the Control of Supplies Act 1961 and another alternative charge under s 20(1) of the same Act. Learned counsel for the defence contends that the learned magistrate had failed to address this issue in his grounds of judgment. Learned counsel for the defence refers to the cases of *Jagar Singh v Public Prosecutor* [1936] 1 MLJ 92; [1936] 1 LNS 25 and *Ravindran a/l Ramasamy v Public Prosecutor* [2015] 6 MLJ 509; [2015] 3 CLJ 421.

The prosecution's contentions

[17] The learned deputy public prosecutor contends that the prosecution has succeeded in proving all the ingredients of the charge against the accused and that the defence is an afterthought. The learned deputy public prosecutor

contends that in a charge under s 21 of the Control of Supplies Act 1961, the ingredients of the offence which must be proved by the prosecution are: (a) that the diesel seized is a controlled item; (b) that the accused has control over the diesel; (c) there is reasonable suspicion that the accused deals with the diesel; and (d) that the accused has no licence or approval to deal with or store the diesel. The position of the law at the end of the case for the prosecution as reiterated in the case of *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 (FC) was quoted in support of the prosecution's submissions.

[18] The prosecution contends that the learned magistrate had rightly made a finding that the accused had control of the diesel in question. The prosecution submits that at the material time, the accused had control of the diesel in question and the main evidence to prove the element of control are that: (a) the lorry No PCD 4398 was found at the open area right in front of the house belonging to the accused's family; (b) the lorry No PCD 4398 belonged to the accused based on exh P7 and the evidence of PW3 and PW6; and (c) the diesel was found in an additional tank at the rear of the lorry No PCD 4398 and covered with canvas. The prosecution relies on the decision of the Court of Appeal of Bandar Seri Begawan, Brunei in case of *Lamat bin Burut v Public Prosecutor* [1993] 2 MLJ 273; [1992] 1 LNS 43 where the court in that case referred to *Public Prosecutor v Jamali bin Adnan* [1985] 2 MLJ 392; [1985] 1 CLJ 196; [1985] CLJ Rep 656 which observed that:

> For myself I would hold that mere knowledge of the whereabouts of offensive material cannot be equated to control. The mere fact that A knows where B has concealed firearms is not enough. There has to be something more. That something to my mind is an element of domination over the material. It must be shown at the very least therefore that the situation where the material is placed is such that the person who had knowledge of its whereabouts had also access of it and could at any opportune moment of his choice have obtained possession of it or the capacity to direct its disposal.
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> This means that control includes an ability to possess, though a person may not be in control if someone else is in possession.

[19] The learned deputy public prosecutor further refers to the cases of *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717 (FC) and *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337 (FC) and submits that the accused had not attempted to explain or provide any explanation in respect of control of the diesel in question. The prosecution submits that the failure of the accused to give a reasonable explanation gave rise to the inference that the accused in fact had knowledge of the diesel.

[20] The learned deputy public prosecutor submits that exh P7 which shows that the lorry PCD 4398 had been sold to the accused must be accepted and that the accused could not give evidence to the contrary based on the parol evidence rule. The accused had not called any witnesses or adduce any evidence to show that exh P7 is not valid. The learned deputy public prosecutor also submits that there is no duplicity of charges because both charges are proffered against the accused under different provisions of the Act. The main charge is under s 21 while the alternative charge is under s 20(1) of the Act. The charges will amount to a duplicity if both charges are proffered simultaneously against the accused as a first and second charge. In the present appeal, the accused was called upon to enter his defence and convicted only of the main charge.

[21] The learned deputy public prosecutor also submits s 25 of the Control of Supplies Act 1961 is applicable and the prosecution only has a duty to prove that the accused committed the act as charged and the burden then shifts on the accused to show that he is entitled to do the act.

[22] The learned deputy public prosecutor submits that the accused's defence is a bare denial and an afterthought. The accused did not provide any evidence to support his defence. The learned deputy public prosecutor relies on the case of *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324; [1980] 1 LNS 212 where the court made a remark that:

> A mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient.

[23] Other submissions relate to the identity of the diesel and sufficiency of the investigation which in my opinion do not give rise to issues raised by the accused in the appeal although canvassed in his petition of appeal.

ANALYSIS AND DECISION

[24] In considering the appeal, the duty of this court is to consider it aligned with the observations made by the Court of Appeal in *Mohd Yusri bin Mangsor & Anor v Public Prosecutor and another appeal* [2014] 4 MLJ 875; [2014] 7 CLJ 897 (CA) in the following terms:

> It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions. Where:
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> (a) the judgment is based upon a wrong premise of fact or of law;
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> (b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course of events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned,

then an appellate court will intervene to rectify that error so that injustice is not occasioned (see *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149 (CA); *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA)).

[25] In *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] MLJU 504; [2006] 1 CLJ 457, the Federal Court recapitulate the duty of a trial court at the end of the case for the prosecution as follows:

After the amendments to ss 173(f) and 180 of the CPC, the statutory test has been altered. What is required of a subordinate court and the High Court under the amended sections is to call for the defence when it is satisfied that a prima facie case has been made out at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused. See *Tai Chai Keh v Public Prosecutor* [1948–1949] supp MLJ 105b; [1948] 1 LNS 122; *Public Prosecutor v Kasmin bin Soeb* [1974] 1 MLJ 230; [1974] 1 LNS 116. If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to the conclusion that a prima facie case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a prima facie case has been made out, it must call for the defence. If the accused then elects to remain silent, the court must proceed to convict him. It is not open to the court to then re-assess the evidence and to determine whether the prosecution had established its case beyond a reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the prima facie case one that is established beyond a reasonable doubt. Put shortly, what the trial court is obliged to do under ss 173(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2

MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 101. If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted.

[26] The meaning of the term prima facie case was explained in the case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 (FC) whereby His Lordship the late Augustine Paul JCA (later FCJ) in delivering the judgment of the Federal Court observed that:

> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase 'prima facie case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary* (11th Ed) as:
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> > A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.
>
> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand, if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

[27] It is therefore imperative that in finding a prima facie case, the court must be satisfied that each and every ingredient of the offence has been established by evidence led by the prosecution. Anything short of it will not suffice.

[28] I have evaluated the record of appeal and considered the submissions of learned counsel and the learned deputy public prosecutor. The only evidence relied upon by the prosecution to prove the ingredient of 'control' for the charge proffered against the accused under s 21 of the Control of Supplies Act 1961, to wit, of the 2,231l of diesel, are firstly, exh P7, namely the letter purporting to be the evidence for the sale of lorry No PCD 4398 by Sin Eng Aun Mobile Crane Sdn Bhd to the accused and secondly, the search result of the National Registration Department, exh P72, which showed that the accused's address is at premise No 2013, Kampung Pengkalan, Batu Kawan, Simpang Ampat, Pulau Pinang and that premise No 2013 belonged to the accused's family whereby the accused mother lived there.

[29] It is not in dispute that as far as the record of the Road Transport Department is concerned, the lorry No PCD 4398 is still registered to Sin Eng Aun Mobile Crane Sdn Bhd. The prosecution sought to prove, by exh P7, that the lorry No PCD 4398 has been sold to the accused on 1 May 2013 for RM20,000 in cash.

[30] PW3 and PW6 as the directors for Sin Eng Aun Mobile Crane Sdn Bhd who is the registered owner of the lorry PCD 4398, gave evidence that lorry No PCD 4398 in which the controlled article was found has been sold to the accused and exh P7 evidenced that sale. However, in cross-examination, PW3 admits that he does not know the contents of exh P7 which he signed because he cannot read. PW6 too in cross-examination admits that he did not understand the contents of exh P7 which he signed.

[31] I am of the considered view, in light of the ownership record of the Road Transport Department in respect of the lorry No PCD 4398 and the contents of exh P7, that there is insufficient evidence adduced by the prosecution to show that the lorry No PCD 4398 in fact do belong to the accused to drive home the ingredient of control by the accused of the diesel in question. In light of the admission by both PW3 and PW6 that they do not understand the contents of exh P7, I would attach very little weight to exh P7 as evidence to prove the sale of lorry No PCD 4398 to the accused.

[32] I am also of the considered view that parole evidence rule in respect of exh P7 is not a relevant consideration. Before parole evidence rule may be invoked by the prosecution to exclude the explanation by the accused as to the ownership of the lorry No PCD 4398, it must first be established that exh P7 comes within the ambit of ss 91 and 92 of the Evidence Act 1950. This has not been done by the prosecution and I am of the considered view that based on the evidence, the parole evidence rule could not be invoked as such.

[33] There was no evidence led by the prosecution to show that the key to the lorry PCD 4398 was obtained from the accused to suggest that the accused had control or at least access to the lorry. There was also no explanation offered by the prosecution about the key to the lorry PCD 4398. According to the investigating officer ('PW7'), the lorry No PCD 4398 was surrendered to her by the raiding team without any keys. This in my considered view, further adds to negative the element of control by the accused.

[34] I also find that exh P72 is not sufficient to prove that the accused was residing at premise No 2013 at the time of the commission of the offence. The record only shows that the accused has an address at premise No 2013. There was no evidence to show that the accused in fact still stays at the premise. The open area where the lorry No PCD 4398 containing the diesel in question was

found belongs to multiple owners but the investigating officer ('PW7') did not note down the name of the owners despite having made a search at the Jawi Land Office and finding out as such.

[35] In dealing with circumstantial evidence, the Federal Court in *Pathmanabhan a/l Nalliannen v Public Prosecutor and other appeals* [2017] 3 MLJ 141; [2017] 4 CLJ 137 (FC) made the following observations:

> [173] The law is well settled on the standard of proof required in criminal cases where the evidence presented before the court to prove the commission of the offence by the accused person is circumstantial in nature.
>
> [174] In *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307; [1962] 1 LNS 22, Thomson CJ, said that '... where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope'.
>
> [175] In *Ahmad Najib bin Aris v Public Prosecutor* [2007] 2 MLJ 505; [2007] 2 CLJ 229, Abdul Aziz Mohamad JCA (as he then was), delivering the judgment of the Court of Appeal said:
>
> > ... As to what circumstantial evidence is, it is needful to quote only that part of the summing up to the jury that is set out in *Idris v Public Prosecutor* [1960] 1 MLJ 296; [1960] 1 LNS 40 at p 297:
> >
> > > With regard to the definition of circumstantial evidence I can give you no better definition than quote to you the words of Lord Cairns in the case of *Belhaven & Stenton Peerage* reported in 1875–6 Appeal Cases, p 279:
> > >
> > > > My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.
> >
> > In other words, circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all ...

[36] I am of the considered view that the two circumstantial evidence relied upon by the prosecution to prove that the accused had control of the controlled article do not irresistibly point to the guilt of the accused. The burden of proof lies on the prosecution to prove its case and at the end of the prosecution's case, there is no burden cast upon the accused.

[37] In finding that the accused has knowledge of the 2,231l of diesel in lorry

No PCD 4398, I am of the considered view that there was misdirection committed by the learned magistrate at p 25 of the record of appeal (Vol 1) when she made a finding that it would be unreasonable if the accused were to say that he has no knowledge because of the 'overwhelming' evidence. The learned magistrate said:

> Malahan adalah sesuatu yang tidak munasabah sekiranya OKT menyatakan beliau tiada pengetahuan dan menafikan pemilikan ke atas diesel tersebut kerana kesemua bukti dan keterangan menjurus terhadap pemilikan beliau ke atas diesel berkenaan.

[38] I am of the considered view that based on the facts and the evidence adduced by the prosecution, the finding of the learned magistrate of the 'overwhelming' evidence is not at all supported.

PRONOUNCEMENT

[39] I am satisfied that the prosecution has failed to prove a prima facie case against the accused as the ingredients of the offence have not been proven. The accused should not have been called upon to enter his defence on the main charge. The appeal against conviction is allowed and the conviction and sentence are set aside. The accused is hereby acquitted and discharged of the main charge.

[40] The accused was also charged with an alternative charge under s 20(1) of the same Act. The learned magistrate called for defence on the main charge but did not make any ruling on the alternative charge. Pursuant to s 173(f) of the Criminal Procedure Code, it is mandatory for the court to make a finding at the end of the prosecution's case whether a prima facie case has been made out against the accused.

[41] Based on the evidence adduced by the prosecution, the learned magistrate did not call upon the accused to enter defence in respect of the alternative charge. I am of the view that the prosecution too has failed to establish a prima facie case against the accused in respect of the alternative charge. In the circumstances, I acquit and discharge the accused of the alternative charge as well.

[42] In respect of the subject matter of the offence, since PW3 and PW6 claim that it has been sold to the accused and the accused denies being the owner of the controlled article, disposal of the controlled article and other vehicles shall, after expiry of the time limited to appeal, be disposed of subject to any claim which may be made under s 414 of the CPC.

Appeal against conviction allowed; conviction and sentence set aside; accused acquitted and discharged of both main and alternative charges.

Reported by Dzulqarnain bin Ab Fatar